BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DERAK LEE HOLM	)	
Claimant	)	
V.	)	
	)	
OMEGA WORKFORCE, LLC	)	Docket No. 1,066,438
Respondent	)	
AND	)	
	)	
RIVERPORT INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant requests review of Administrative Law Judge Bruce Moore's January 24, 2014 preliminary hearing Order. James S. Oswalt of Hutchinson, Kansas, appeared for claimant. Ronald J. Laskowski of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the judge and consists of the transcript of the October 10, 2013 preliminary hearing and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUES

Claimant filed an application for hearing on August 7, 2013, alleging a series of accidents from January 2013 through July 11, 2013, while bending, stooping and lifting tree brush, limbs and logs for respondent. Following a hearing and a court-ordered medical evaluation, preliminary benefits were denied. The judge ruled claimant failed to prove personal injury by accident or repetitive trauma arising out of and in the course of his employment. The judge concluded claimant's complaints represented a symptomatic aggravation of a preexisting condition, claimant failed to prove personal injury, i.e., a change in the physical structure of the body, and claimant failed to prove his asserted work-related accident was the prevailing factor in causing his injury, medical condition or disability.

Claimant requests the preliminary hearing Order be reversed, arguing he proved more probably than not that his work activities caused a new injury resulting in a structural change to his back, and his work activities were the prevailing factor in causing this change. Respondent maintains the Order should be affirmed.

FINDINGS OF FACT

Claimant began working for respondent, a temporary employment agency, in January 2013. Claimant was placed with Treder Tree Service. Claimant worked as a grounds man, which involved lifting and hauling wood, trimming trees, sawing wood with a chain saw, running branches through a wood chipper and organizing tools.

Claimant testified that in April or May 2013, he began experiencing discomfort and pain in his lower extremities and low back while lifting and hauling wood. He testified he would have a little relief at night and on weekends. His condition gradually worsened. His testimony is not entirely clear, but it appears claimant "felt something go and . . . couldn't walk"[1] when he was putting wood in a chipper on July 10, 2013, his last day worked. Claimant was unable to get out of bed on July 11, 2013. He contacted Ryan Staggs, his supervisor at Treder Tree Service, and told him he "felt something pop in [his] back at work"[2] and asked to have the weekend off to rest.

Neil Lutgen, respondent's program director, testified he was notified by Mark Treder of Treder Tree Service that claimant was alleging a work injury. Shortly thereafter, Mr. Lutgen spoke with claimant. According to Mr. Lutgen, he asked claimant when he was injured and claimant replied it was an "ongoing thing"[3] while denying any specific incident involving his back going out or a popping in his back. Respondent referred claimant for treatment with Brian Billings, M.D., a general practitioner.

On July 16, 2013, claimant was seen by Dr. Billings for complaints of constant, severe, sharp, burning and stabbing low back pain which "started 3 months ago."[4] Dr. Billings noted claimant reported "an acute episode with no prior history of back pain."[5] Dr. Billings also noted claimant associated his pain with job-related repetitive lifting. Claimant was referred to physical therapy and provided a 20 pound restriction, which respondent was unable to accommodate.

Claimant testified that while undergoing physical therapy, his condition worsened and he began experiencing pain radiating to his knees and numbness in his toes, with the right leg being worse than the left. Claimant denied pain radiating down to his knees or toes before the accident.

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[1] P.H. Trans. at 37.

[2] *Id*. at 16.

[3] *Id*. at 44.

[4] *Id*., Cl. Ex. 1 at 3.

[5] *Id*.

Claimant testified the statement contained in Dr. Billings' records that he had no prior history of back pain was inaccurate, but he acknowledged providing such information to the doctor. Hospital records show claimant has a history of back pain:

- On January 9, 2003, claimant was treated for lacerations and contusions following a motor vehicle accident. A consultation report noted claimant took "aspirin occasionally for back pain."[6]

- On June 7, 2006, claimant was diagnosed with chronic low back pain. A record noted a history of chronic back pain since 2002.

- On January 9, 2008, claimant was treated for low back pain radiating into his left upper thigh.

- On March 22, 2009, claimant was treated for low back pain radiating into his left upper thigh from a possible lifting incident at home. The emergency physician record noted a history of chronic back pain.

- On March 28, 2009, claimant was treated for low back pain after helping a friend move.

- On September 23, 2009, claimant was treated for low back pain. The treating physician's clinical impression was chronic low back pain.

- Darren K. Orme, D.O., interpreted claimant's April 15, 2010 lumbar spine MRI as showing "L5-S1 disk protrusion with bilateral neural foraminal narrowing."[7]

As part of his prior treatment, claimant was prescribed an anti-inflammatory medication, Celebrex, and received injections in his back.

Getting back to the more recent complaints of back pain, no prior history of back pain was again noted when claimant returned to Dr. Billings on July 30, 2013. Dr. Billings reported claimant's pain was "not radiating down his legs."[8] A lumbar x-ray was ordered and it showed mild degenerative disc disease at L4-5 and L5-S1. Left straight leg raise testing was positive. Dr. Billings continued claimant's restrictions.

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[6] *Id.*, Cl. Ex. 2 at 26.

[7] *Id.*, Cl. Ex. 1 at 32.

[8] *Id.* at 6.

Respondent referred claimant to Matthew Henry, M.D., a neurosurgeon, who evaluated claimant on August 21, 2013. Dr. Henry observed claimant was:

> . . . putting wood in a wood chipper and lifting some logs, and he felt something go in his back. He was having some muscle aches before this although it was unlike this.[9]

Dr. Henry diagnosed claimant with degeneration of lumbar or lumbosacral intervertebral disc and lumbago. Dr. Henry recommended a new MRI which was performed on September 3, 2013. The MRI was read by Dr. Orme as showing "L5-S1 disc protrusion again noted with the overall transverse extension to perhaps slightly [*sic*] increase in severity from previous study. Mild endplate osteophyte formation is also present. This results in bilateral neural foraminal narrowing slightly greater on the right."[10]

Claimant returned to Dr. Henry on September 11, 2013, with numbness and tingling in his bilateral legs. After comparing the 2013 MRI with the 2010 MRI, Dr. Henry indicated in his September 11, 2013 report and corresponding letter to Dr. Billings: "[t]he new MRI revealed an exacerbation of a preexisting condition with a disc bulge at L5-S1, slightly worse than the one previously."[11] Dr. Henry did not feel surgery would be beneficial and recommended a muscle relaxant and epidural steroid injections. Dr. Henry continued claimant's 20 pound restriction for six weeks, as well as no excessive bending and/or twisting of the lower back. Dr. Henry noted treatment under workers compensation would be reasonable for claimant's back strain and muscle inflammation, but not for claimant's preexisting L5-S1 disc damage.

On October 2, 2013, claimant was seen at his attorney's request by George Fluter, M.D. Claimant provided a history of having awakened in severe pain after working long hours using a wood chipper and clearing brush. Claimant complained of constant aching, shooting and burning pain affecting the right side of his neck, low back and right leg, as well as numbness in both feet. Dr. Fluter diagnosed claimant with low back/bilateral lower extremity pain, lumbosacral strain/sprain, probable lower extremity radiculitis and probable sacroiliac joint dysfunction. In addressing causation and prevailing factor, Dr. Fluter stated:

> **Causation:** Based upon the available information and to a reasonable degree of medical probability, there is a causal/contributory relationship between [clamant's] current condition and repetitive work-related activities as a tree trimmer. These activities are over and above those associated with routine activities of daily living.

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[9] *Id*. at 22.

[10] *Id*. at 17-18, 38-39.

[11] *Id*. at 12, 15.

> The medical records indicate that [claimant] has had back pain for several years. He has had several emergency room visits for back pain. However, tree trimming is an occupation that involves a heavy category of physical demand. Imaging studies of the lumbar spine done on 09/03/13 showed some progression of the structural changes affecting the lumbar spine when compared to imaging studies from 04/15/10. More likely than not, this does not simply represent an aggravation/acceleration of an underlying condition.
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> **Prevailing Factor:** The prevailing factor for this injury and the need for medical evaluation/treatment is the repetitive work-related activities.[12]

Dr. Fluter recommended medications, x-rays, MRI, EMG, pool-based physical therapy, TENS unit, injections and a neurosurgical evaluation or second opinion. Dr. Fluter provided claimant light duty and postural restrictions.

Dr. Henry, in an October 28, 2013 letter to respondent's counsel, noted claimant admitted chronic back pain subsequent to a motor vehicle accident in 2009, but reported his back pain starting July 11, 2013 was different. Dr. Henry compared the 2010 and 2013 lumbar MRI studies and noted the latter MRI "revealed a L5-S1 disc bulge which may be slightly worse than the previous one; however if anything it is very minimal."[13] Regarding prevailing factor, Dr. Henry stated:

> It is within a reasonable degree of medical certainty that lifting logs and placing them into a chipper caused muscle inflammation and strain in [claimant's] low back; however it is not the prevailing factor for the L5-S1 disc bulge as it is a pre-existing condition. The work itself did not cause any anatomical or structural change to the lumbar spine as it is not the prevailing factor in causing the need for medical treatment or any current disability.[14]

On November 8, 2013, Judge Moore ordered claimant to be evaluated by Paul Stein, M.D. Such court-ordered independent medical examination occurred on January 6, 2014. Claimant provided Dr. Stein a history of experiencing lower back pain while lifting at work in July 2013, followed the next day by significant back pain radiating down his right leg. Claimant complained of pain in the right side of the lower back extending into the iliac crest and hip area, into the right lower extremity. Dr. Stein observed the 2013 MRI was "essentially the same as the study of 4/15/10 allowing for technical differences."[15]

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[12] Fluter report dated Oct. 2, 2013 at 5.

[13] Henry report dated Oct. 28, 2013 at 1.

[14] *Id*.

[15] Stein report dated Jan. 6, 2014 at 5.

In addressing causation and prevailing factor, Dr. Stein stated:

> [Claimant] complains of lower back pain with nonverifiable radicular-type pain into the right posterior thigh. He relates this to his work activity. Past medical records reflect chronic and intermittent lower back symptomatology which [claimant] indicates was never as constant or severe as his current status. He indicates his prior episodes of back pain were "muscles" but an MRI scan of the lumbar spine in 2010 shows a moderate disk protrusion at L5-S1 similar to the current study of 9/3/13. Within the limit of technical parameters, there is no evidence of significant structural change to the lower back between these studies.
>
> The current symptomatology represents an aggravation of the preexisting L5-S1 disk disease. The primary or prevailing factor is the preexisting and previously symptomatic pathology.

The January 24, 2014 preliminary hearing Order stated:

> Claimant has failed to sustain his burden of proof of personal injury by accident or repetitive trauma, arising out of and in the course of his employment. Claimant's complaints represent a symptomatic aggravation of a pre-existing condition, without a demonstrated change in the physical structure of the body. Claimant has failed to establish that the claimed work-related accident was the prevailing factor in causing Claimant's injury, medical condition or disability.[16]

Claimant filed a timely appeal.

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-501b provides, in part:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
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> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[17]

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[16] ALJ Order (Jan. 24, 2014) at 1.

[17] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

The phrases arising "out of" and "in the course of" employment are conjunctive; each condition must exist for compensability. They have separate and distinct meanings:

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[18]

K.S.A. 2013 Supp. 44-508 states, in part:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
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> (e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
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> . . .
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> (f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
>
> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

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[18] *Id.*

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

ANALYSIS

Without doubt, claimant experienced low back pain while working. However, as noted in the judge's preliminary hearing Order, claimant did not overcome three hurdles to obtaining compensation.

First, claimant did not prove he had a "personal injury" or "injury," as defined by the Kansas Workers Compensation Act as any lesion or change in the physical structure of the body, causing damage or harm thereto. While Dr. Fluter (and Dr. Henry in his September 11, 2013 report and corresponding letter) opined claimant's MRI picture was worse in 2013 than it was in 2010, such conclusion does not identify any structural change occasioned by claimant's work activities. A progression of degenerative changes over nearly 3½ years does not mean any advancement in degeneration was due to job duties, whether by an accident or repetitive trauma.

Moreover, Drs. Stein, Henry and Orme compared the older and newer MRI studies and concluded, respectively, that: (1) they were similar or essentially the same; (2) there "may be" a slight or minimal worsening; and (3) there was perhaps a slight increase in severity from previous study. Words like "may" and "perhaps" do not rise to the more probable than not probable burden of proof that claimant must satisfy. Dr. Henry plainly indicated in his October 28, 2013 letter that claimant's work did not cause an anatomical or structural change to claimant's lumbar spine.

Second, the evidence shows claimant, at best, sustained a sole aggravation of a preexisting condition, as concluded by Drs. Stein and Henry.

Third, the Board adopts the court-ordered and neutral opinion from Dr. Stein that the prevailing factor in claimant's symptomatology was his preexisting and previously symptomatic pathology. Such opinion dovetails well with Dr. Henry's opinion that claimant's work activities were not the prevailing factor in his need for medical treatment or his disability.

Finally, this case is dissimilar to *Gilpin*,[19] in which a Board Member affirmed the judge's conclusion that Mr. Gilpin's injury was not solely an aggravation of his preexisting spondylolisthesis, but an alteration of the physical structure of such spondylolisthesis and the accident was the prevailing factor in his need for medical treatment.

CONCLUSIONS

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member concludes:

- claimant did not prove a "personal injury" or "injury" as defined by the Kansas Workers Compensation Act;
- claimant, at best, sustained a sole aggravation of a preexisting condition; and
- claimant did not prove an accident or repetitive trauma was the prevailing factor in causing any injury, disability and need for medical treatment.

WHEREFORE, the undersigned Board Member affirms the January 24, 2014 preliminary hearing Order.[20]

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[19] *Gilpin v. Lanier Trucking*, No. 1,059,754, 2012 WL 6101121 (Kan. WCAB Nov. 19, 2012).

[20] By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

IT IS SO ORDERED.

Dated this _____ day of March 2014.

_____
HONORABLE JOHN F. CARPINELLI
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